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SUMMER 2019

ENVOY

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From the President



I'm sure you will all agree it's great to see summer arrive, but it is hard to believe that another year has nearly drawn to a close!

Branch AGMs
Successful branch AGMs have been held throughout the country, with some branches having a change of president. We welcome Pip Glasson as the Auckland Waikato Branch President, Ally McEldowney as the Bay of Plenty Gisborne Branch President, Sheryl Thornton as the Wellington Central Districts Branch President and Jo Langton as the new Canterbury Southern Districts Branch President.

My sincere thanks to their predecessors: Carmen Franich, Auckland Waikato Branch; Raewyn Miller, Bay of Plenty Gisborne Branch; Cheryl Whitworth, Wellington Central Districts Branch; and Jill Forde. Canterbury Southern Districts Branch. They have all spent a great deal of time, and given a strong commitment and support not only to their branches but also to the National Council during their terms as branch presidents.

National AGM in Auckland
The national AGM was held at the institute's office in Auckland on Saturday, 9 November. Thank you to the members who attended or gave their apologies and/or returned proxy forms.

Congratulations to Pam Harliwich, Ian Jespersen, Debbie Masters and Linda Whatson on being re-elected to the council, and to Jill Forde and Carmen Franich who were elected as independent councillors, having previously been on the council as branch presidents. Sadly, we said farewell to Jenny Gilmore and Raewyn Miller. Our thanks to them both for their years of commitment to the institute and service on the council.

At the AGM we acknowledged Jenny Stenning, a long-standing, now retired member, for her many years of service to the institute as a councillor. Jenny has joined the small group of retired members granted honorary life membership in recognition of their significant contributions to the legal executive profession and the institute during their careers. Jenny will be profiled in the Autumn 2020 issue of *Envoy*, together with the new branch presidents.

With Christmas fast approaching, you will no doubt be in the middle of Christmas functions and the inevitable rush of work that seems to come with the season. Please remember to take care of yourself and those around you.

I wish you a very happy and restful holiday season, and look forward to catching up with as many of you as possible in the coming year.



Necia Parker
President



Branch updates

Northland

Kerikeri Long Lunch
The Far North supplied the sunshine for the branch's Kerikeri Long Lunch held at Marsden Estate. It was a great success with 15 members attending. We were greeted with some wine tasting before being shown to our table beneath the wisteria and overlooking the Marsden Estate gardens and lake.

Kerikeri sunshine, great company, great food and a few bottles of rosé . . . what more could you want? We're really looking forward to doing it again!

Christmas lunch
The branch will hold its Christmas lunch in Kerikeri on Sunday, 24 November. At the time of writing, the event is still in the planning stages, but we hope to hold it at the Plough and Feather in Kerikeri, down by the old Stone Store.

AGM
We held the branch AGM on 15 October; the committee for 2019-20 is:

- President: Nicky Dreadon
- Secretary: Amy Jones
- Treasurer: Jennette Overton
- Social Coordinators: Julie Jaggard and Alana Lyall
- Seminars: Shannon Boykett
- Newsletters: Amy Jones

The committee will shortly be holding a planning session for the coming year. Amongst other things, we will be looking at ways to connect more with members in the Far North so we can provide more education and social events.

On behalf of the Northland Branch committee, I wish you all a very happy Christmas and relaxing New Year.

Nicky Dreadon
Northland Branch President



Auckland Waikato

Auckland Waikato Branch held its AGM on 30 September; Carmen Franich stepped down as Auckland Waikato Branch President having served the maximum of four consecutive years in the role. Carmen did a great job – thank you Carmen. I know that I will be able to call upon her for guidance and advice should I need it.

An introduction
I'm Pip Glasson and I am the new Auckland Waikato Branch President. I work at Duncan Cotterill in Auckland's CBD. I have been on the branch committee for five years helping to organise events and sending the branch newsletters to Auckland Waikato members. For the last two years I have been branch vice president. I'm delighted to step up to the role as president, and I look forward to talking and meeting with more of our members across the region.

New committee members
The Auckland Waikato committee has a great depth of experience across its membership. It was, however, great to see a number of members at the AGM who were interested in becoming involved. We are therefore excited to welcome Danielle Cronin and Marilyn Morell to the committee.

End of year parties
At the time of writing, we have finalised arrangements for our Christmas functions – at The Lula Inn at the Viaduct for Auckland members and at Gothenburg in Hamilton for Waikato members. We surveyed members to collate ideas and to ensure we organised the best events possible, so I'm hoping that these will be great evenings for all!

We have started planning for seminars to be held in early 2020; more information on these will be sent out in due course. We always welcome feedback, so if there is a topic you would like covered please get in touch with any of our committee members.

I know it has been a busy year for all of us. I hope you all have a safe and relaxing break and return refreshed for 2020.

Pip Glasson
Auckland Waikato
Branch President





Bay of Plenty Gisborne

It has been a busy few months for the branch with various social functions around the region and now we find ourselves at the end of another year.

Introducing myself
I was elected Bay of Plenty Gisborne Branch President following the branch AGM on 24 October and I am looking forward to taking on this new role. I have lived in Tauranga for four years and was the branch secretary over that time. I encourage branch members to contact me should there be anything they would like raised with the branch committee or the National Council. I also welcome ideas for seminars or social activities as the committee begins its planning for the coming 12 months.

Branch celebrates - 30 years old
On 4 October, we celebrated the branch's 30th birthday at Prince's Gate in Rotorua. The event was well-attended with pre-dinner drinks, canapes, speakers and dinner. Honorary Life Member, Shirley Watson, spoke about how things were done 'back in the good old days'. While technology has changed the way we transact in our day-to-day working environment and we have become more efficient, unfortunately this has also come at the cost of no longer meeting other legal executives face-to-face outside the office. I therefore greatly encourage members to attend social functions and seminars organised by the branch throughout the region, as this is an excellent way of networking with each other.

Visit to Gisborne
Raewyn Miller and Jo Buckton had planned a 'meet and greet' with Gisborne members in September but unfortunately, due to a family bereavement, Raewyn was unable to attend. Despite going solo, Jo had an enjoyable time meeting with Gisborne legal executives over drinks and dinner.

AGM and new committee members
As already noted we held our branch AGM on 24 October. A big thank you to outgoing Bay of Plenty Gisborne Branch President, Raewyn Miller, who stepped down after four years in the role. I am thrilled that Raewyn will remain on the committee and will be there to support me in my new role as branch president.

Sadly, we said farewell to John Boyes and Amanda McIntosh, both of whom were on the committee for a number of years. Their valued contribution will be greatly missed and we thank them for their support and commitment over the years.

We welcome onto the committee: Sherrie Slappendel from Lance Lawson in Rotorua, Debra Boyd-Collins from Michael Toner Law in Tauranga, and Grace Fox from CG Law in Mount Maunganui. I am also pleased to advise that Sue Cameron from Woodward Chrisp has agreed to be the social convenor for Gisborne.

Social events
At the time of writing, the committee is planning end of year functions in Rotorua, Tauranga and Gisborne. Invitations will be sent out to members and we look forward to seeing you at one of these events.

I wish you all a very enjoyable and well-deserved Christmas break with family and friends.

Ally McEldowney
Bay of Plenty Gisborne
Branch President





Wellington Central Districts

It is hard to believe this year is nearly over - it must be the fastest on record! We are hoping for a cracker summer after what seems like a cooler-than-usual spring for the country, and very patchy weather here in Wellington.

Branch AGM
There was a good turnout at the Wellington Central Districts Branch AGM on Thursday, 10 October, held at Buddle Findlay's Wellington office. Regional members attended by teleconference. I was elected the incoming president, with Cheryl Whitworth standing down after serving three years in the role. Cheryl was an amazing president and represented our branch at a very high level. I have big shoes to fill! I am thrilled that Cheryl is staying on as a committee member; her continued support to the incoming committee, and to me, is invaluable.

Letitia Bunting also stood down at the AGM. Our branch secretary for several years, Letitia was on the committee for a number of years before that. Letitia has worked tirelessly for our branch and her contribution to the committee was outstanding. In the past, Letitia organised graduation ceremonies and other events; we have all appreciated and benefitted from her efficiency. We will miss Letitia from the committee - but she now gets to enjoy some more time with her family.

New committee
Our branch committee now comprises: Sheryl Thornton, President, Wellington; Nicole Mangin, Vice President, Palmerston North; Debbie Masters, Treasurer, New Plymouth; Josie McDermott, Secretary, Lower Hutt; Lesley Cobb, Newsletter, Wellington; Claire Maddocks, Wellington; Sonya Harper, Wellington; Cheryl Whitworth, Hawkes Bay; Angie Chaplow, Hastings; Sallyanne Belmont, Hastings; and Pam Green from Palmerston North.

We hope that with more Wellington-based committee members, we can offer those members more exciting things ahead!

Christmas functions
By the time you read this, our various regions will have had their Christmas functions. In Wellington this year, we switched from a lunch to a dinner in the hope that people would stay on and enjoy the evening without having to rush back to work as they would with a lunchtime event. We will have some photos and a write-up of the different areas' Christmas functions in our end of year branch newsletter.

Conference
I was unable to attend conference this year (being overseas) but everyone I have spoken with raved about it. I always look forward to conference. The topics covered are interesting and it is a great chance to catch up with friends and network with colleagues.

The year ahead
I wish you all a very Merry Christmas and safe travels wherever your holiday takes you. Here's hoping 2020 will be a successful one for you all.

Sheryl Thornton
Wellington Central Districts
Branch President

Canterbury Southern Districts

Our branch AGM was held on 7 October. I was elected president, Barbara Davey was elected secretary and our former president, Jill Forde, was elected treasurer and vice president.

I acknowledge the great job Jill has done over the past four years as branch president – thank you Jill.

The rest of the committee comprises Pam Harliwich, Nicola Thyne, Jill O'Neill, Cheryl Clausen, Deb Drew, Nikki Riach and Kymberlee Dobson, all from Christchurch. Barbara Davey and Karen Whall have joined the committee following our AGM. They are also Christchurch-based. Our regional representatives are Penny Green, Ashburton; Jacqui Walker, Timaru; Jan Omnet, Oamaru; Nicki Howie, Dunedin; Diana de Koning, Queenstown; Mal Freeman, Southland; and Alison Smith from the West Coast.

Seminars
The livestreaming of our seminars has been very successful this year and we look forward to continuing with this in 2020. The committee is always keen for new ideas for seminars - members' suggestions are welcome. Please send your ideas to our branch email: canterburywestland@nzile.org.nz

End of year
Christmas functions have been held throughout the region, with the branch subsidising these again this year as a way of giving back to our members.

On behalf of the Canterbury Southern Districts Branch, we wish everyone a Merry Christmas and a relaxing holiday break.

Jo Langton
Canterbury Southern Districts Branch President



Nelson Marlborough

What a brilliant summer we are having and it is set to only get hotter. Nelson city held a very successful Paddlefest in late October (stand up paddle boards, surf skis, single waka ama and double waka ama) that was well attended by the community. Lots of kids got to have a go and challenge themselves.

Branch AGM
Our AGM was held in early November, with a good turnout. Thank you to all those members who attended. I thank the committee members for continuing in their roles and ask that anyone who may want to be involved to make contact - we are always more than happy to have the help if you would like to contribute. In particular, we are looking for someone to be the newsletter guru; if you have skills in desktop publishing that would be brilliant. We are also looking for a Marlborough representative if anyone from Blenheim would like to be the contact on that side of the hill?

Christmas
For Christmas this year we held a pizza and movie night that was much enjoyed by those who attended – thank you. Marlborough members held a successful Christmas function in late November which was also well-attended. The branch provided nibbles for the festivities at both events.

2020
We have scheduled a seminar in February to be held at Tasman District Council in Richmond, looking at how we deal with buildings that are wholly or partly outside the boundary and on a legal road, and what does it really mean when a title is subject to Part IVA of the Conservation Act 1987? We often see this memorial which appears obsolete, so what to do with it? The presenters will be Tasman District Council staff.

If there are any other suggestions for seminar topics, please let any of the committee members know.

I hope to have the opportunity to meet more members of the branch and anticipate getting across to Blenheim in the coming year.

Robyn Dewson
Nelson Marlborough Branch President



Very successful 2019 legal executives' conference in Wellington educates and entertains

New Zealand Institute of Legal Executives

NZILE's biennial conference was held in August at Te Papa in Wellington with the support of NZLS CLE Ltd. The very successful event covered a wide range of legal topics, including commercial leasing, retirement villages, wills and winding up trusts.

Participants enjoyed the opportunity to mix with colleagues and make new contacts throughout the conference.

EPAs and PPPR applications

Buchanan Gray partner, Annette Gray, spoke about difficult issues relating to enduring powers of attorney and protection of personal and property rights applications. She said that any legally-competent person could grant a power of attorney for a finite or unlimited period, authorising an attorney to make decisions and act on his or her behalf in respect of financial affairs.

Ms Gray said that a person should not be presumed to lack capacity simply because he or she intended to make a decision that a person exercising ordinary prudence would not make in the same circumstances. Capacity did not require a donor to be capable of managing his or her property and affairs on a regular basis. Rather, the test was whether the donor understood the nature and effect of the powers being granted to the attorney and whether the donor would hypothetically have been able to perform all of the acts authorised by the donor.

Ms Gray noted that there was no obligation for an attorney to act. Legal executives taking instructions from a donor should accordingly make sure that the donor had selected an attorney who was prepared to take on the responsibilities. Although there was no requirement for attorneys to have legal advice regarding their responsibilities, it was worth encouraging donors to obtain legal advice for their attorneys so the attorneys understood what they would be taking on.

Ms Gray went on to speak about difficult situations which could arise in relation to powers of attorney. She said that there were court remedies available if there were concerns about an attorney's behaviour in relation to a donor. Under section 103 of the Protection of Personal and Property Rights Act 1988, the court could review decisions made by the attorney and make any order it thought fit. If the court was satisfied that the attorney was not acting in the best interests of the donor, or was not complying with his or her obligations under section 99A or 99B, the court had power to revoke an EPA. If the court found that a donor had been induced by undue influence or fraud to create the power, or that the attorney was not suitable for the role, the court was required to revoke the power.

In the case of *Public Trust v Vernon* [2016] NZCA 388, a son misappropriated all of his elderly father's assets by using his EPA. After the father's death, Public Trust as executor sought to recover the funds from the son and his wife. The High Court ordered that the money be repaid and the Court of Appeal upheld that decision.

Ms Gray said that, when a donor was a trustee and held a power of appointment or any other role in a trust, an attorney could not manage the trust assets as trustee's powers could not be delegated, except as set out in section 31 of the Trustee Act 1956. If there were concerns about a donor failing in capacity, it was therefore important to take steps to have him or her retire as trustee before the loss of capacity.

Estate administration

Taylor Shaw legal executive, Kim James, and principal, Ingrid Taylor, discussed the challenges faced in estate administration. They said that poor drafting of wills was not unusual as the task was sometimes undertaken in a hurry or without sufficient care, attention or supervision, and was often not adequately charged for. The case of *Turner v Coombe* [2018] NZAR 574 provided an example of 'dodgy drafting' and resulted in five-and-a-half years of litigation.

A clause providing for the formation of a trust on the testator's death did not detail whether or not it was to be a charitable trust, how some family members were to be dealt with, who the 'needy persons' mentioned actually were, or whether the trustees could distribute capital or only income.

The speakers said that legal executives drafting wills should not simply act as scribes for clients.

"It is your job to guide clients and give them legal advice surrounding the decisions they wish to make. It is your job to ensure that the will-makers' wishes have the best chance of being upheld and that they are advised of any potential risks and disputes."

Legal executives should accordingly consider where challenges might arise, and what could be done to address those. Section 4(1) of the Family Protection Act 1955 sets out the basis for claims under the Act and specified which family members could claim against estates when the deceased failed to make 'adequate provision' for them.

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Plenary, pre-session

When taking will instructions from a client who wishes to provide unequal shares for children, legal executives need to advise clients what was considered by the courts to be 'proper maintenance and support'. That was a broad approach that included the need to recognise the child as a valued member of the family. 'Support' was a wider term than 'maintenance'. A child's path through life was supported not just by financial provision to meet economic needs, but also by recognising the fact that the child belonged to that family and played an important part in the overall life of the deceased.

The size of the estate was also relevant, as were the economic needs of each of the beneficiaries. If one child had no economic need, it might be sufficient to leave him or her a small legacy, rather than leaving that child out altogether. In the case of *Williams v Aucutt* [2000] 2 NZLR 479 the will-maker left $50,000 to her wealthy daughter and the remainder of her $1 million estate to her other daughter, who was not as well off as her sister.

Following a legal challenge, the court ruled that the bequest to the wealthy daughter should be increased to $100,000.

The presenters noted that elderly clients were susceptible to influence, due to cognitive issues commonly arising with age. The speakers suggested using a template for recording a capacity assessment before taking a will. This could help ensure that a mindful assessment was made without clients necessarily feeling quizzed about their capacity.

Residential sales and purchases

Simpson Grierson senior associate, Sandy Donaldson, examined general issues with residential sales and purchases. She noted that the new version (8) ADLS/REINZ Agreement for Sale and Purchase of Real Estate had been released on 12 November 2018 to take account of legislative changes impacting on sales and purchases. The Overseas Investment Amendment Act 2018 had come into force on 22 October 2018 and brought with it the requirement to complete a Residential Land Statement for every purchaser as part of the conveyancing process.

Ms Donaldson said that pre-contractual statements in the property context were often representations which resulted in a party being induced to enter into a contract. In determining inducement, it must be shown that the plaintiff acted reasonably in relying on the representation made. A representation that no reasonable person in the plaintiff's position would have relied on, is not actionable.

Ms Donaldson said that real estate agents must accurately represent properties and ensure that any known defects are identified to prospective purchasers. Section 14 of the Fair Trading Act 1986 prohibits false representations or misleading conduct in connection with the sale of land. A purchaser might be able to cancel a contract if it could be shown that he or she had been induced to enter into a contract on the basis of an essential and substantial misrepresentation.

The requirements for the location and details of smoke alarms in rental properties, as well as tenants' responsibilities in relation to alarms were outlined. Landlords must ensure that smoke alarms are working at the start of each new tenancy and that they remain working throughout the tenancy. Where alarms were designed to permit the replacement of batteries, tenants are responsible for changing batteries which expire during a tenancy.

Ms Donaldson said that the Residential Tenancies Amendment Act 2019 allowed for termination where premises were unlawful residential premises. Such premises included dwellings without building consents; sleep-outs converted into separate, independent dwellings; premises originally built for commercial or industrial purposes; and premises on the mezzanine floor of a commercial property. The Tenancy Tribunal has full jurisdiction

over cases relating to unlawful residential tenancies. It can order a landlord to fully or partially repay rent, issue a work order requiring the landlord to take action to make the premises lawful or make an exemplary damages order.

The government is consulting on proposals to limit rent rises to once a year, to allow pets and to prohibit landlords from terminating tenancies for no cause.

Changing culture in the legal workplace

Dyhrberg Drayton partner, Steph Dyhrberg, and Kerrin Humphrey, New Zealand Law Society Culture Manager, discussed the changing culture of the legal workplace. They said that *#metoo* had come to New Zealand's legal profession in the aftermath of what had happened to five summer clerks at Russell McVeagh in 2016. Prior to the publicity over those events, there had been a culture of the profession closing its eyes and ears to unacceptable sexual behaviours, mainly to women. That conduct included prevalent, low-level sexist attitudes and jokes, inappropriate searching questions about sexuality, repeated requests for dates, inappropriate touching, sexual assault, attempted rape and rape.

"Why is it coming out now? The tide of public opinion is turning. Growing awareness about rape culture, street harassment and 'casual' racism has led to activism to stop it. The increased focus on bullying and workplace safety have all highlighted the legal obligations of employers . . . Our colleagues are talking more about their experiences, which is encouraging others to speak up. Law firms are having to take this issue and their risks more seriously."

The presenters said that, in addition to inappropriate sexual behaviour, bullying was all too common in legal workplaces: it often felt (and was) gendered.

"The sort of conduct people describe is the partner or supervisor who sets impossible or constantly shifting standards, seems never satisfied, doesn't acknowledge a good job, or makes disparaging comments and unreasonable demands . . . they may frequently lose their temper, there may be yelling, swearing at the person, throwing or kicking objects, through to assault. Many small actions can add up. Not all of the behaviour is seen in every case."

Ms Dyhrberg and Ms Humphrey said that their impressions were that the broad culture of law could be disempowering and it protected the people who behaved badly. Law had traditionally been male-dominated and the fact that firms were private partnerships meant that there was no board or shareholders demanding accountability. Policies and procedures to address the behaviour either did not exist, or were not used because of power imbalances.

Ms Dyhrberg said law firms often did not sufficiently value and protect people who were not the top fee earners and partners. The latter had been almost untouchable and, in the past, had rarely been held to account.

The presenters said that all employers had legal obligations to ensure they provided safe, healthy workplaces for all employees, contractors, volunteers and visitors. They must take practical steps to stop harassment from occurring, and to investigate and address harassment and complaints. Every organisation's policies and procedures, and the help available from the profession and wider networks, should be widely available. Providing immediate access to confidential counselling or an employee assistance programme when disclosures were made was very important, but this did not end the employer's obligations.

"If we keep doing the same things the same way, change will not come . . . We need to influence and challenge those in positions of authority and hold them accountable for ensuring the health and safety of their workplaces. The membership organisations that represent employees working in the law; unions, including the newly created Aotearoa Legal Workers' Union; The New Zealand Institute of Legal Executives; the New Zealand Law Society; the New Zealand Bar Association and the regional women lawyers' associations are all playing their parts. Get involved." ■



Tax update

Inland Revenue
Te Tari Taake



Consultation on rules for deducting land holding costs

In October, Inland Revenue released a second consultation document, *Holding costs for privately used land that is taxable on sale,* relating to the rules for deducting land holding costs. The department said that there was currently a lack of clarity about the deductibility of holding costs – for example, rates, interest, insurance, repairs and maintenance expenditure - when land that was subject to tax on sale was used privately while it was held.

The paper gave the example of a bach or second home that was sold within five years, meaning that the gain from the sale was taxable under the bright-line test. That tax liability would also arise when a person regularly purchased properties to renovate and sell them, and lived in the properties while he or she owned them.

The document said that it was generally accepted that holding costs were deductible to the extent that land was used to earn taxable income. For example, a person who owned a rental property could deduct holding costs in full because they related to the taxable rental income. Equally, if land was held by a land dealer, holding costs were deductible in full because they related to the taxable income from the sale of the land.

However, the tax system did not allow deductions for expenditure to the extent that it was private or domestic in nature. This was known as 'private limitation' and meant that holding costs relating to a person's main home were not deductible.

The paper proposed that the law be amended to ensure that the costs of acquisition and improvements to land were deductible when land was taxable on sale under the bright-line test or the various 10-year rules, despite there being no knowledge that the land sale was going to be taxable when the expenditure was incurred. There should also be an amendment to ensure that the provision that allowed a deduction for the costs of acquisition and improvements overrode the private limitation so that the whole of those costs were deductible even if the land was used privately.

The paper suggested three options for the deductibility of holding costs for private use periods: apportionment, allowing all deductions, or denying all deductions.

Tax initiatives announced to support businesses

The government has announced that it will allow deductions for feasibility expenditure for businesses and will relax the loss continuity rules. Finance Minister, the Hon Grant Robertson and Minister for Small Business and Revenue, the Hon Stuart Nash, said that the costs associated with exploring whether to invest in a new asset or business model were often not deductible for tax purposes. Business owners had told the government that this could deter them from spending money looking at better ways to do things.

The law would be changed to permit businesses to deduct feasibility expenditure from their tax bills, including for proposals that did not eventually proceed. Mr Nash said that the current rules were particularly problematic for infrastructure companies, meaning that the change would help to unlock investment. Qualifying expenditure totalling less than $10,000 would be deductible immediately, with deductions being spread over five years. The measure would be included in a taxation bill to be introduced to Parliament early in 2020.

The ministers said that the government would also change New Zealand's loss continuity rules to make it easier for start-ups to attract investment and get off the ground. Business and tax experts would be consulted on the proposals before the end of 2019, along with a review of the existing R&D tax loss cash out rules.

Changes proposed to rules for taxing certain land sales

A tax policy consultation document entitled *Habitual buying and selling of land* was released as part of plans to overhaul the rules relating to taxation of certain land sales. Inland Revenue said that the rules providing for the taxation of certain land sales contained exclusions from tax for people who used that land as their main home, residence or business premises. However, those exclusions were not meant to apply when a taxpayer had a 'regular pattern' of buying and selling land used as a main home, residence or business

premises. The department said there were concerns that the current regular pattern restrictions were not working as intended.

The paper said that the current regular pattern restrictions applied quite narrowly to the activities of a single person, enabling taxpayers to circumvent the restrictions by buying and selling land using different but associated persons or entities each time. To resolve that concern, Inland Revenue suggested that an amendment be made to ensure that the restrictions applied where a person, group of people or entity had a regular pattern of buying and selling land that had been occupied by the person or group of people as their main home, residence or business premises; or that had been occupied as a main home, residence or business premises by the person or group of people that controlled the entity or entities that owned the land.

Tax treatment of land use payments clarified

Revenue Minister, the Hon Stuart Nash announced his intention to introduce a legislative amendment to ensure that payments received by land owners from the grant of land rights such as licences or limited term easements continued to be taxable.

Mr Nash said that payments for the grant of land rights had always been intended to be taxable income under current legislation, but doubts had been raised about the clarity of the relevant legislation.

"We want to eliminate any doubt. So I have asked officials to begin work on a remedial amendment to be included in the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Bill."

Mr Nash said that the proposed amendment would apply retrospectively from 1 April 2013 with a savings provision protecting positions taken before the announcement. The savings provision would apply to taxpayers who had already filed tax returns or received binding rulings from Inland Revenue on the basis that the payments were not taxable prior to the announcement. ■

Sources: www.ird.govt.nz/news and tax policy.

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CHANGING THE CULTURE OF A PROFESSION

Cases update



Property

Supreme Court refuses leave extension to pursue claim against law firm

The case of *Harry Memelink and Lynx Trustees Ltd as trustees of Link Trust (No 1) v Collins & May Law* [2019] NZSC 114 involved Harry Memelink instructing a law firm to act for his family trust, the Link Trust (No 1), to settle the purchase of a property. At the time, the property was owned by Mr Hoyte and his wife, Ms Matthews, as tenants in common in equal shares. The transaction had its origins in a dispute between Mr Memelink and Mr Hoyte over the ownership of a company and related issues.

Although the purchase price was agreed to be $570,000, Mr Memelink instructed the law firm that the arrangements he had entered into for the transfer of the property to the trust were such that the trust would be required to pay only $232,569 to complete the settlement. The balance of the price would be met by setting off amounts owed to Mr Memelink and related entities.

On 5 September 2012, Ms Mathews successfully claimed her share of the equity in the agreed $570,000 purchase price from the trust on the basis that she had agreed to mortgage her share of the property and therefore her share could not be offset against the debt to the trust. The trust and Mr Memelink then issued proceedings against the law firm. They alleged that the firm had acted negligently for the trust on settlement, by not properly documenting that the payment of $232,569 fully discharged the trust's obligation to pay the $570,000 sale price. They claimed damages of $155,715, the amount the High Court had ordered the trust to pay to Ms Matthews.

The law firm denied liability on the basis of the alleged limited scope of its instructions. It submitted that it had been instructed to settle the transfer on the basis of the settlement statement. In particular, it asserted that it did not have a duty to the trust or to Mr Memelink to review or document the underlying arrangements pursuant to which the trust paid only $232,567 on settlement.

The applicants succeeded in the High Court and the law firm appealed to the Court of Appeal, which set aside the High Court orders. The applicants then applied to the Supreme Court for leave to appeal against the Court of Appeal judgment. The application for leave was over a year out of time and Mr Memelink was by then bankrupt and had not sought the approval of the Official Assignee to bring the application.

The Supreme Court dismissed the application for an extension of time to apply for leave to appeal.

Family dispute over property settled by Court of Appeal

In *Almond v Read* [2019] NZCA 26, family members disputed the basis on which a rural property in Drury, South Auckland, had been bought and developed, and the basis on which it was owned. The appellant, Ms Almond, was the sister of Bruce and Christopher Read and the daughter of Ethne Read – the latter three were the respondents in the case.

Although Ms Almond was the sole registered proprietor of the property, the respondents alleged that they had helped to pay for it and for the construction of two houses on the land. They claimed that their contributions had been made pursuant to an agreement that each party would have a beneficial interest in the property in proportion to his or her financial contribution. The respondents said that Ms Almond held title to the property as constructive trustee for their individual interests. Ms Read further alleged that Ms Almond had misused an enduring power of attorney in respect of Ms Read and had misapplied Ms Read's funds for Ms Almond's own personal benefit.

In the High Court, Ms Almond maintained that she had provided all of the purchase money for the property and that, although her brothers had contributed to costs and maintenance, those contributions were made in recognition of the care Ms Almond would provide to her parents while she and her parents lived on the land.

The High Court rejected Ms Almond's evidence that the money used to purchase the land was hers. Ms Almond appealed to the Court of Appeal, shifting the focus of her argument and submitting that the High Court had erred in finding that all parties had a common intention to pool resources to buy the property and develop it in return for proportionate shares. Ms Almond argued that this was an arrangement between her and her parents in order for her parents to help her buy and develop land, but with no expectation they would have a proprietary interest in the land.

The Court of Appeal dismissed Ms Almond's appeal, holding that it was based on a version of events differing from that pleaded and argued in the High Court, and not supported by the evidence she

had given the High Court. The Court of Appeal was not satisfied that the High Court had erred in its credibility and factual findings.

The Court of Appeal held that an institutional constructive trust had arisen and Ms Almond must yield the property pursuant to the parties' expressed common intention. The appeal was dismissed.

This case illustrates the importance of documenting financial contributions and agreements relating to property, even in the family context. Recording such matters in writing means that all parties are clear about their intentions and avoids the need for expensive future court proceedings.

Court of Appeal upholds restrictive covenants

In *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd* [2019] NZCA 147, Ye Qing had entered into an agreement to purchase 8.45 hectares of land near Pokeno. The land had the benefit of two covenants. Shortly after settlement, Mr Ye transferred the land to New Zealand Industrial Park Ltd. He was the sole director of the company and it had always been his intention to transfer the land to the company.

When the covenants were created, the land had been owned by Winstone Aggregates Ltd and was zoned for aggregate extraction and processing. Winstone entered into the covenants with the then-owners of two adjoining properties to help protect any future quarry operation from complaints by neighbours. Both covenants provided that the servient land was only to be used for grazing, lifestyle farming and forestry and no complaints were to be made about any quarrying on the dominant land.

Stonehill Trustee Ltd bought the land and in 2018 entered into a conditional agreement to sell it to Synlait Milk Ltd. The agreement recorded that, if Stonehill had not procured the surrender of the covenants by settlement date, Synlait could elect to enter into possession of the land without any obligation to pay interest or other monies to the vendor, cancel the agreement, or settle without prejudice to its rights, including as to compensation.

Stonehill failed to negotiate a surrender of the covenants and, in May 2018, filed court proceedings seeking orders under section 317 of the Property Law Act 2007 extinguishing or modifying the covenants so they no longer applied to its land. Synlait obtained resource consents for earthworks and the construction and operation of a dairy factory on the land.

The High Court granted orders that the restrictive covenants be modified so that they no longer applied to Stonehill's land and declined to order compensation to New Zealand Industrial Park relating to the modification of the covenants. New Zealand Industrial Park appealed and Stonehill cross-appealed.

The Court of Appeal granted the appeal and set aside the High Court orders, reinstating the covenants. The Court of Appeal said that there had been an insufficient change in the nature or extent of the use of the benefited and burdened lands to justify extinguishing the covenants. The aggregate resource was located on the appellant's land and that land was still zoned for aggregate extraction and processing. The only change in the use of the burdened land was the construction of the dairy factory in breach of the covenants.

Although the neighbourhood had changed, that did not justify extinguishing the covenants. The changes had not increased the burden imposed by the covenants to an extent different from what could reasonably have been contemplated when they were entered into 20 years ago for a term of 200 years.

Wills

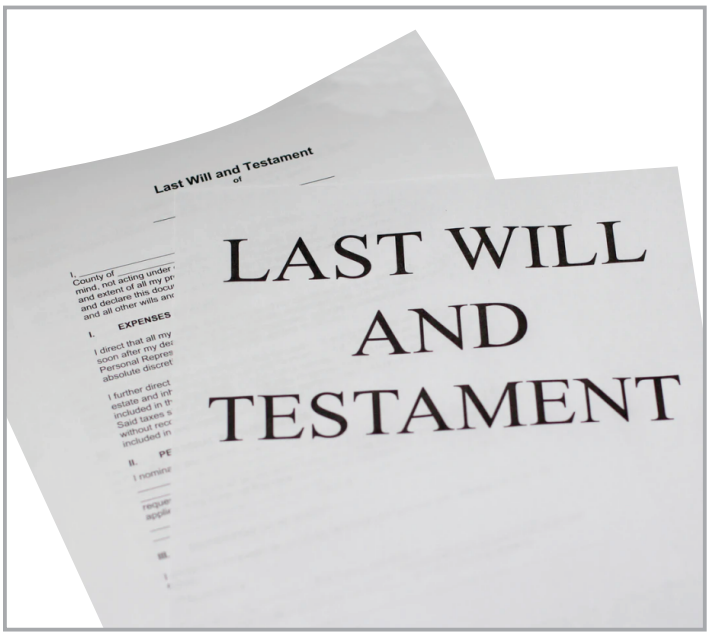
Estranged stepson inherits estate after note in wardrobe declared valid will

A stepson estranged from his stepmother for a decade has inherited her estate after the High Court ruled that a note found in the woman's wardrobe was a valid will. The case of *Palmer v Spencer* [2019] NZHC 1808 involved Pamela Parker marrying Richard Palmer in 1976. Mr Palmer had been married previously and had three children. Andrew Palmer had regular contact with Pamela when he was young and described her as effectively becoming his second mother.

Pamela made a will in 2003, but in 2008 there was a falling out between Pamela and Andrew and his wife and the parties had no contact for 10 years. Pamela made a new will in 2009. In 2014, Andrew and his wife reconciled with Pamela after learning that she was ill and the parties thereafter had a good relationship.

Pamela later wrote a note stating that she had cancelled her will 'due to family issues' and that the family was now reconciled and 'they are now owners & carers of my home, contents, estates, car etc.' After Pamela's death, Andrew and his wife were choosing clothes for her to be dressed in for her cremation and found a note in her bedroom wardrobe. It purported to be an informal will made by Pamela.

The High Court held that the note was a document which had the appearance of a will and expressed the deceased's testamentary intentions. An order was made under section 14 of the Wills Act 2007, declaring the document to be Pamela's last valid will. ■





Legal executive news from around the world

England and Wales

127 new Chartered Legal Executive lawyers celebrate qualification

In mid-October, 127 new Chartered Legal Executive lawyers swore an oath to mark their qualification at the annual graduation ceremony held by the Chartered Institute of Legal Executives (CILEx) in London.

They were joined by a further 161 members who were recognised for achieving the preceding step of becoming graduates by completing the academic requirements of the qualification. CILEx President, Matthew Foster, and guest speaker, Elizabeth Johnson – CILEx's first female judge – praised graduates for their achievements and hard work and encouraged them to embrace the opportunities now open to them.

Earlier this year Ms Johnson, a CILEx Fellow with more than 20 years' experience as a personal injury specialist, was appointed as a judge for the First-Tier Tribunal in the Social Entitlement Chamber. She shared her experiences of working as a Chartered Legal Executive and the journey that led her to apply to be a judge.

“Since being appointed I'm often asked whether being a woman has held me back, either as a lawyer or in applying to be a judge.

“Personally, I didn't go looking for barriers. I suppose I trusted the process - that if I was good enough, I stood as good a chance as anyone else, regardless of my gender or qualification. I'm fiercely optimistic. I tend to plough on, work hard and trust that the good will rise, that talent and hard work will be recognised.”

Ms Johnson said that, as the CILEx graduates opened new doors for themselves, they should not forget to wedge open those doors for others to follow in their footsteps. She observed that it took more courage to champion change than to resist it, and graduates should be courageous and be their best.

Lawyers *#UsToo*

In October, CILEx said that it was pleased to see the reform proposals in the UK Government Equalities Office's consultation on sexual harassment in the workplace. It hoped that changes would result in a general requirement for all employers to bolster their internal safeguarding mechanisms to prevent incidents occurring, rather than relying on victims to take steps to prevent harassment.

CILEx said that sexual harassment in workplaces continued, despite the noble efforts of movements such as *#metoo* to raise awareness and empower victims to come forward. Prevention and enforcement were still lacking and it was important to recognise the shortcomings of current systems in protecting victims' rights.

“Weak enforcement powers of the European Human Rights Commission, combined with significant access to justice barriers in the employment tribunal, have left victims of sexual harassment unable to seek the redress that they deserve, the justice that they seek and the closure that they very much need.





"CILEx members have bravely come forward to demonstrate that even amongst lawyers, who possess a greater understanding of our justice system, these barriers, such as the tribunal's three-month limitation period, have prevented them from enforcing their rights and protections, as the time limits provided fail to account for the emotional complexity and wider sensitivities of these cases."

Pro Bono Week 2019

Pro Bono Week 2019 took place in November. There were four key themes - changing lives through pro bono, celebrating pro bono, why pro bono was valuable for careers, and new developments in pro bono. The fourth theme discussed cross-sector collaboration, new forms of pro bono practice, improving pro bono technical assistance and the use of new legal technology.

National Awards 2019

The winners of CILEx's second National Awards were revealed at a ceremony in London in September. Welsh firm Caswell Jones partner, Fran Edwards, was given a lifetime achievement award in recognition of her outstanding service both to CILEx and to the wider legal community.

Ms Edwards was a CILEx Council member for a decade until 2018 and was President from 2014-15. She remains involved with CILEx as Wales adviser. She has been prominent in campaigning for access to justice in Wales and is a member of the Legal Wales Board and a trustee of the Access to Justice Foundation and Reaching Justice Wales.

Other awards included the Mental Health and Wellbeing Initiative award; the Paralegal Apprentice of the Year; and the Chartered Legal Executive Apprentice of the Year.

Australia

Legal Executives' 2019 conference

The Legal Executives' 2019 one-day conference was held in Melbourne in March. The day began with a presentation about risk management for legal executives; this was followed by a session on property settlements, and GST withholding and payment.

Two presentations then took an in-depth look at electronic lodgement including an update on the Electronic Lodgement Network and a talk about eConveyancing and ELNOs (Electronic Lodgment Network Operators). Attendees heard about cyber security and how to recognise and protect against digital threats, as well as current issues relating to wills, estates and powers of attorney.

The conference concluded with a session on ethical issues for legal executives presented by ethics consultant, Donna Cooper and ethics4lawyers director, Michael Dolan. ■

Sources: www.cilex.org.uk; www.liv.asn.au/legalexecutives.



Alleged murder and possible fraud require High Court to make broad interpretation of law

New Zealand's increasingly diverse population means that the courts are more often required to deal with estates with inter-country issues. A case earlier this year involved complex facts relating to New Zealand and Bangladesh, and a multi-year battle over the proceeds of a life insurance policy.

In *Estate of Miah* [2019] NZHC 1278, Abdur and Afrouza Miah both entered into a life insurance policy covering the life of Mrs Miah with AMP in June 2006. The policy provided a life insurance benefit of $2 million on Mrs Miah's death.

Three wills executed

In 2007, Mr Miah faced financial difficulties and was adjudicated bankrupt in April of that year. Mr Miah said that Mrs Miah had returned to Bangladesh that same month. On 25 April, Mr Miah, acting in accordance with a power of attorney given to him by Mrs Miah some years earlier, executed what was said to be a will of Mrs Miah, appointing himself executor and leaving $1.54 million proceeds from the policy to their children and the balance to other persons who appeared to be creditors.

A second will was said to have been executed by Mrs Miah on 5 May 2007 in Bangladesh, revoking her previous will, appointing Mr Miah as her executor, identifying her half share in the policy as her estate and leaving it to her children. Mrs Miah was said to have made a third will in Bangladesh on 11 May 2007, again appointing Mr Miah as her executor and directing that the proceeds of the policy be distributed to 'my family and my creditors.'

Wife 'dies' in Bangladesh

On 22 May 2007, Mrs Miah was said to have died in Bangladesh. Mr Miah sought an order under section 71 of the Administration Act 1969 recognising an order made by the District Court of Dhaka, Bangladesh, granting probate to Mr Miah to administer the estate of his wife. Such an order would mean that the foreign probate order would be effective in New Zealand.

Caveat lodged

A caveat was lodged by AMP Life Ltd under section 60 of the Act challenging the grant of probate. An order nisi – in effect a temporary order granting probate – was made by the Registrar on 2 October 2018. The order required AMP to show cause for its caveat under section 61(a)(ii). Mr Miah asked that the caveat be discharged and the order nisi be made absolute. AMP requested that the order nisi be discharged, with the effect that the probate order of the Bangladesh court would not be recognised in New Zealand.

Copies of all three of Mrs Miah's wills were placed before the court and affidavits were provided from those who apparently witnessed her last will. Mr Miah put in evidence a copy of what he said was her death certificate. He also said that she had been murdered. His counsel subsequently filed a memorandum purporting to be a translation of orders from the District Court in Dhaka identifying that Mr Miah had been acquitted of his wife's murder in absentia but that Billal Hossain had been found guilty. Counsel for AMP said that Mr Hossain was Mr Miah's brother. Mr Miah did not mention these matters in his affidavits.

Husband makes claim under life insurance policy

On 5 July 2007, Mr Miah submitted a claim under the policy. In March 2012, AMP avoided the policy on the ground of material non-disclosure or misstatement of financial information when it was first entered. The Official Assignee appointed under Mr Miah's bankruptcy concluded that AMP had correctly avoided the policy and, accordingly, no steps were taken to recover the insurance proceeds.

Mr Miah was discharged from bankruptcy in August 2011 and in 2013 filed proceedings against AMP seeking payment under the policy. The matter went to the Court of Appeal, which ruled that the interests of Mr and Mrs Miah in the policy were severable and that the interest of Mrs Miah, which would be vested in her executor, could continue to be advanced in the proceedings.

In August 2017, AMP lodged a caveat against probate being granted on Mrs Miah's will in New Zealand. However, on 25 June 2018, counsel for Mr Miah applied to reseal the order said to have been earlier made by the court in Bangladesh granting Mr Miah probate.

> “The case illustrates the complexities and expense involved when the events and laws of more than one country impinge on an estate.”

Justice Cooke said that the facts were complex, with a number of affidavits being filed questioning whether any orders had been made in Bangladesh regarding Mrs Miah's estate and also querying whether the judge said to have granted the orders actually existed. AMP sought to have the documents from Bangladesh forensically examined but Mr Miah did not consent. AMP also wanted the New Zealand High Court to communicate with the court in Bangladesh under Rule 1.22 of the High Court Rules 2016 but Mr Miah did not agree to that.

Justice Cooke said that the matters relied on by AMP satisfied him that the order nisi should clearly not be made absolute: Mrs Miah had supposedly travelled to Bangladesh just as her husband was being made bankrupt. She had then made three wills in short succession in which she left the proceeds of an insurance policy to Mr Miah and the children and, days later, had then apparently been murdered by her brother-in-law. Mr Miah's affidavits had not addressed the circumstances in a full and transparent way. The affidavit evidence filed by AMP raised significant issues about the authenticity of the alleged court documents from Bangladesh.

Justice Cooke said that, on the basis of the materials he had, he concluded it was more likely than not that the documents were not authentic. However, he queried why Mr Miah should have entered into such an elaborate plan of fraud, as under New Zealand's intestacy rules Mrs Miah's interest in the policy would pass one-third to Mr Miah and two-thirds to their children. Mr Miah under the High Court Rules would also be entitled to be executor.

Justice Cooke said that, in the circumstances, Mr Miah should not be appointed executor and that some other person should be appointed under section 6 of the Administration Act. His Honour said that he considered the power exercised in section 6 to be similar to that arising under section 21, where the court had indicated that it had a reasonably broad role in deciding whether an executor should be removed. This might involve interpreting the discretion more broadly than had been the case to date, but it appeared justified.
Justice Cooke said that Mr Miah was strongly opposed to this course of action but there were a number of issues still to be determined. For example, the only evidence that Mrs Miah was actually deceased was Mr Miah's affidavit and the copy of the death certificate from Bangladesh. AMP did not admit that Mrs Miah was dead.

The court said that the prospect of a hearing in solemn form would be avoided if Mr Miah would allow the disputed documents – particularly the death certificate and the formal result of the trial in Bangladesh – to be forensically examined, or if he would allow the court to communicate with the court in Bangladesh.

Justice Cooke ordered that the order nisi be discharged and said that future steps were in Mr Miah's hands.

Significant complexities and expense involved

The case illustrates the complexities and expense involved when the events and laws of more than one country impinge on an estate. It will be interesting to see whether Justice Cooke's broad interpretation of section 6 is upheld in future cases and by higher courts.

Legal executives preparing wills and dealing with estates when more than one country is involved should take particular care to check and verify documents, and to query apparently contradictory or suspicious facts. ■



Lengthy court battle over 'idiosyncratic and curmudgeonly' millionaire's will

The importance of executing wills and other legal documents before issues as to capacity arise has once again been underlined by a court battle over an elderly man's estate.

The case also illustrates the importance of legal executives ensuring that will-makers understand the implications of the Family Protection Act 1955 and are thoroughly advised about the consequences of making little or no provision for one or more children.

In *De Gregorio v Surridge* [2019] NZHC 1802, Wilbur Surridge was a successful businessman and, according to the High Court, an 'idiosyncratic and curmudgeonly' individual. He established a number of companies that manufactured and supplied cleaning products. As at the date of the hearing, the assets of the companies were worth approximately $8.6 million.

Unequal distribution to children in will

Mr Surridge died in December 2016 and was survived by five adult children and a number of grandchildren and great-grandchildren. In his last will, Mr Surridge appointed Nunzio de Gregorio to be the executor and trustee of his will. After making a gift of $10,000 to a charitable organisation, Mr Surridge left the residue of his estate to four of his children – 22.5% each – with his fifth child, Anne, receiving the remaining 10% of the residue.

Three documents central to the proceedings were prepared and urgently executed on 21 January 2014, at a time when 89-year-old Mr Surridge was in hospital, bleeding from the bowel, sleep-deprived and distressed. The documents were a new will; a deed of assignment giving Ms Pearson, Mr Surridge's daughter-in-law, his legal rights of management, control and direction over his private and corporate assets; and an enduring power of attorney appointing Mr Surridge's lawyer to be his attorney in relation to personal and property affairs. Mr Surridge expressly withheld his consent to a will being executed on his behalf if he lacked capacity.

In 2015, Anne filed court proceedings challenging Mr Surridge's capacity to grant an enduring power of attorney. A settlement was reached whereby the five children were to share equally in Mr Surridge's assets and Ms Pearson renounced her rights under the deed of assignment.

Mr Surridge died in December 2016 and Nunzio de Gregorio filed an application for a grant of probate. Anne filed a statement of defence and a counter-claim alleging that her father lacked testamentary capacity or that his will had been procured by undue influence in the form of pressure from his son Paul and his wife, Ms Pearson. Anne and her son also filed Family Court proceedings for orders under the Family Protection Act 1955. Ms Pearson sought to enforce the deed of assignment and challenged the validity of the settlement.

Justice Clark said that the 'discordant and complex' family had brought voluminous evidence to court, but only some of it was relevant.

"Consistent threads running through all accounts of Lofty [Mr Surridge] tell of his lack of insight into his behaviour towards his children, his capacity for great cruelty, his complex relationships with his children and that he was a stubborn and manipulative man. Nevertheless, there seemed to be consensus that he cared deeply for his family but that his 'favourite child' was the group of companies referred to as the Surridge companies."

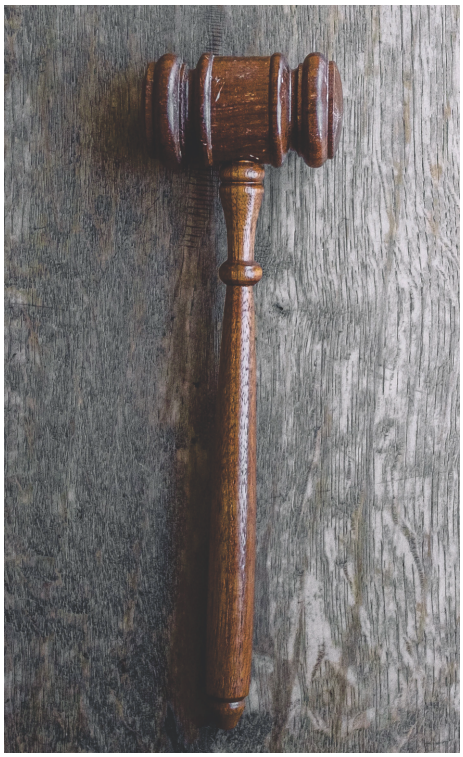
Did Mr Surridge have capacity?

On 21 January 2014, Mr Surridge's lawyer had received written instructions from Paul to urgently prepare the three documents. The lawyer and Paul visited Mr Surridge in hospital and the documents were executed. On 29 January 2014, a CT brain scan suggested Mr Surridge suffered from moderate cognitive impairment consistent with dementia. On 17 February, he was assessed by a geriatrician as lacking mental capacity to decide his living arrangements on discharge from hospital.

Justice Clark said that, as proponents of the will, Paul and Ms Pearson were required to establish that Mr Surridge had capacity to make a will only if there was some evidence raising lack of capacity as a tenable issue. Anne argued that, for capacity to be accepted, the court would have to accept the evidence of family, the lawyer and a nurse over all the medical evidence, including the evidence of two experts. Paul submitted that Mr Surridge was a man of sharp wit and sound business acumen, and he had chosen when to make his will and fully understood what he was doing.

Earlier will made with equal shares to children

Justice Clark reviewed all of the evidence in relation to capacity in detail and concluded there was sufficient medical and lay evidence to displace the presumption of capacity. Her Honour noted that Paul had been unaware at the time his evidence was filed and served that Mr Surridge had made a will in 2000 bequeathing to each of the five children 20% of his personal chattels and the residue of the estate to the Philip Moore



Trust, of which all five children were discretionary beneficiaries.

Justice Clark said that Paul's evidence that he had remonstrated with his father to achieve a fair division of the estate and that the 2014 will reflected the diminished share to Anne that Mr Surridge supposedly 'demanded' was inconsistent with the provisions of the 2000 will. Her Honour said that Paul's evidence raised serious questions, either as to Mr Surridge's mental state or as to the reliability of Paul's testimony.

Later will declared invalid

The court said that the 2014 will was a marked departure from the 2000 will. It contained errors, and the evidence as to an advisory trustee who had never met or had dealings with Mr Surridge raised large concerns. Justice Clark concluded that there should be a declaration that the 2014 will was invalid for lack of capacity.

Her Honour also said that the circumstances in which Mr Surridge executed the 2014 will also raised a more probable inference of undue influence than not. Paul had drafted the will and remained in the room while Mr Surridge discussed it with his lawyer. The amount of benefit to Ms Pearson under the deed of assignment was so substantial, and so much more of a benefit to her than to any of Mr Surridge's children, that it was indicative of undue influence. Further, a decade-long estrangement between Paul and his father had ended only 14 months earlier and in the subsequent period it appeared that Mr Surridge and Ms Pearson had become extraordinarily close. Being extremely frail and ill, and suffering from delirium and dementia, Mr Surridge was clearly vulnerable and directable.

Justice Clark accordingly held that Mr Surridge had been unduly influenced when he executed the 2014 will. Probate of the 2000 will was granted to a Deloitte partner. The result would be that any residue under the will would be distributed equally among the five children. ■

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Australian property title certificates – on the way out . . . not quite

Andrew Johnstone of APEARS, Sydney, Australia



APEARS

Property titles in Australia are governed by the six state and two territory governments. All of their processes and requirements to transact are different. Recently a move to electronic conveyancing has meant the need for paper title certificates is being reviewed. In some instances no paper titles exist and in others they don't exist when a mortgage is registered.

With an increasing number of New Zealand owners of Australian property, I thought it would be helpful to summarise the particular requirements for each state/territory.

Queensland

Since 1 October 2019, there have been no paper titles required for any property dealings in Queensland. Until 30 September, some titles in Queensland had been issued as paper certificates. This was established through a search of the title and, if one had been issued, it had to be lodged or declared lost for any dealing to be registered. Now there is no need for any paper title to be lodged even if one has been issued. All paper titles are cancelled with the registry and an electronic title is now the only official record.

New South Wales

Paper titles are still on issue for all titles. There is, however, an exception where a title with a registered mortgage through a financial institution is held electronically through the Titles Registry with the relevant bank. Any dealings with those particular titles requires an electronic acceptance from that particular bank. Most title dealings are now completed electronically and the actual certificate, if on issue, is kept by the relevant conveyancer - who must keep it for seven years post-deal!

Tasmania

The Tasmanian Land Titles Office still uses paper certificates. However, it 'holds' titles on behalf of a number of financial institutions, government agencies, etc. This means that the Office does not print a paper certificate, rather it creates a record that the title is held on behalf of that entity and that entity can deal with (produce) that title electronically.

The Office has no firm plans to abolish paper certificates, but it is considering some options. It has recently appointed a new Recorder of Titles and he has signalled investigating a move towards more electronic processing. Banks are still required to lodge an original paper mortgage; once registered the original paper mortgage is returned to the lodging party.



South Australia

Since 4 July 2016, South Australian certificates of title are no longer printed, nor required to be produced at lodgement; all titles are now held electronically. (The South Australia government is the most advanced of all of our state governments in this arena.)

Western Australia

The Western Australia registry, Landgate, uses a system where all original paper certificates are kept at the registry and duplicate paper certificates are issued to the property owner when requested. If a duplicate certificate has been issued, it must be lodged for any transaction, or replacement (lost title) documentation completed, prior to any dealing being registered.

Victoria

The state of Victoria operates in a similar way to New South Wales; paper certificates for all titles are still issued by the Titles Registry. The exception is that a title with a registered mortgage through a specific registered financial institution is held electronically.

Northern Territory

The Land Titles Office in the Northern Territory continues to issue paper titles on request; otherwise, the title is in electronic form. There is no plan to abolish this arrangement any time soon.

In the Northern Territory, mortgages can be lodged in duplicate. The Office registers the mortgage, endorses both documents and returns one to the bank. Few banks lodge in duplicate these days, however this option is available.

Australian Capital Territory

All certificates are paper issued and all must be produced physically for any dealings. (ACT/Canberra is a government centre, so there is no inclination to avoid bureaucracy!)

We have a way to go in Australia before wholeheartedly embracing electronic conveyancing and the abolition of all paper certificates.

If you are involved in a property transaction in Australia, I recommend undertaking a search in the first instance to check if a title is required before making any transactions. Once the title issue is sorted, then you can consider any stamp duty implications (yes, we still have this duty). As with property titles, the stamp duty situation differs for each state; the topic probably requires at least another edition of *Envoy* or two to be reviewed in full! ■

Regards from Australia,
Andrew Johnstone
APEARS

APEARS

To contact Andrew, please email him at andrew@apears.com.au - his full contact details are on page 19.

JobLink - FAQs



What is JobLink?

JobLink is a members-only service. Its purpose is to assist NZILE members with finding employment as Registered Legal Executives. JobLink is available to all members and their employers.

How does JobLink work?

Prospective employers email their advertisement (in Word format please) to Victoria at the institute's national office (see details below). Employers have the following options:

- List the vacancy on the NZILE website only, or
- List the vacancy on the website *and* have the advertisement emailed to members, providing direct and effective distribution. Very few members have chosen not to receive JobLink notifications. Emails are sent mid-week, each week.

What are the charges for JobLink?

Website: There is no charge for an employer to list their vacancy on the NZILE website. Job advertisements are listed for three weeks, or until the closing date on the advertisement.

Email: There is a fee of $75 +GST, for email distribution to the NZILE database of over 1,200 members across New Zealand. The fee is payable in advance, on invoice.

Members: There is no charge for members to receive JobLink emails and/or view job advertisements on the website. However, members need to have registered on the website to access members-only information.

What positions can be advertised on JobLink?

JobLink is only for Registered Legal Executive positions or roles that will help junior members into full legal executive positions. We do not assist with filling secretarial positions or other roles.

How do I register for JobLink?

All members are automatically added to the JobLink database using the email address on their application form. Please contact us if you would prefer to use a different address to receive JobLink emails.

Alternatively, to stop receiving JobLink notifications please email victoria@nzile.org.nz with 'JobLink - Unsubscribe', in the subject line.

Can I send you my CV, and will you help me find a job?

Please don't send us your CV. JobLink is an information service only, to notify members of job opportunities. If you are interested in applying for a position it is up to you to follow up with the employer, as outlined in the advertisement. We cannot forward CVs to employers on your behalf.

What information should be included in the job advertisement?

- The firm's logo
- A description of the position, and
- Contact details and a closing date for applications.

Your HR person is welcome to add some personality to the advertisement, describe your team or workplace, and who the ideal candidate may be.

If you have any further questions regarding JobLink, please contact our JobLink Co-ordinator, Victoria Fenner on 09 250 1630, or email victoria@nzile.org.nz ■

Some reminders for legal executives

Who can witness statutory declarations?

- NZILE Fellows who are in the employment of a lawyer with a current practising certificate may witness statutory declarations pursuant to the Oaths and Declarations Amendment Act 2001. See the relevant section of the Act below.
- Fellows who are not employed in law firms cannot witness statutory declarations.
- Affiliates, Associates and Support members do *not* have the authority to witness statutory declarations.
- Eligible Fellows should have stamps made to affix to declarations that clearly show that they are NZILE Fellows and duly authorised. All eligible Fellows are advised of the NZILE National Council's recommended wording for their stamp when their Fellow status is approved. It is not sufficient to use a stamp that includes only your name, city and 'Registered Legal Executive'. If you are a Fellow and you need to have a new stamp made, please contact us for the preferred wording.
- NZILE members do not have statutory authority to witness affidavits.

9 Declarations made in New Zealand

(1) A declaration made in New Zealand must be in the form in Schedule 1, and must be made before —

(a) a person enrolled as a barrister and solicitor of the High Court; or
(b) a Justice of the Peace; or
(c) a notary public; or
(ca) the Registrar or a Deputy Registrar of the Supreme Court; or
(d) the Registrar or a Deputy Registrar of the Court of Appeal; or
(e) a Registrar or Deputy Registrar of the High Court or the District Court; or
(f) some other person authorised by law to administer an oath; or
(g) a member of Parliament; or
(h) a person who—
  (i) is a fellow of the body (incorporated under the Incorporated Societies Act 1908) that, immediately before the commencement of the Oaths and Declarations Amendment Act 2001, was called the New Zealand Institute of Legal Executives; and
  (ii) is acting in the employment of the holder of a practising certificate as a barrister and solicitor of the High Court;
  or
(i) an employee of the New Zealand Transport Agency, authorised for that purpose (by name, or as the holder for the time being of a specified office or title) by the Minister of Justice by notice in the *Gazette*; or
(ia) an employee of Public Trust constituted under the Public Trust Act 2001, authorised for that purpose (by name, or as the holder for the time being of a specified office or title) by the Minister of Justice by notice in the *Gazette*; or
(j) an officer in the service of the Crown, or of a local authority within the meaning of the Local Government Act 2002, authorised for that purpose (by name, or as the holder for the time being of a specified office or title) by the Minister of Justice by notice in the *Gazette*.

Can I witness enduring powers of attorney?

Registered Legal Executives, being NZILE Fellows, Associates, and Affiliates with at least 12 months' experience as legal executives, may witness enduring powers of attorney pursuant to the Protection of Personal and Property Rights Amendment Act 2007.

Support members are not Registered Legal Executives and may not witness enduring powers of attorney.

Parental leave

If you are a Registered Legal Executive (Affiliate, Associate or Fellow) and planning to take parental leave, please contact the Membership Administrator, Victoria Fenner, at the NZILE National Office, for a copy of the institute's parental leave policy and to discuss changes to your membership while you are on leave. Victoria can be reached at victoria@nzile.org.nz.



Have you changed employment?

If so, you need to let us know! If you are a Registered Legal Executive your registration is dependent on continuing to meet qualifying employment criteria, and your new supervising lawyer needs to confirm this. Additionally, we need to update our records and advise your NZILE branch so that you continue to receive NZILE communications. Please contact Victoria to advise your new details and request the change of employment QE form at victoria@nzile.org.nz ■

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The Council thanks Councillors' employers for their generous support of the institute.

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New Zealand Institute of Legal Executives

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